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THE CORPORATION TRUST COMPANY AND AFFILIATED COMPANIES

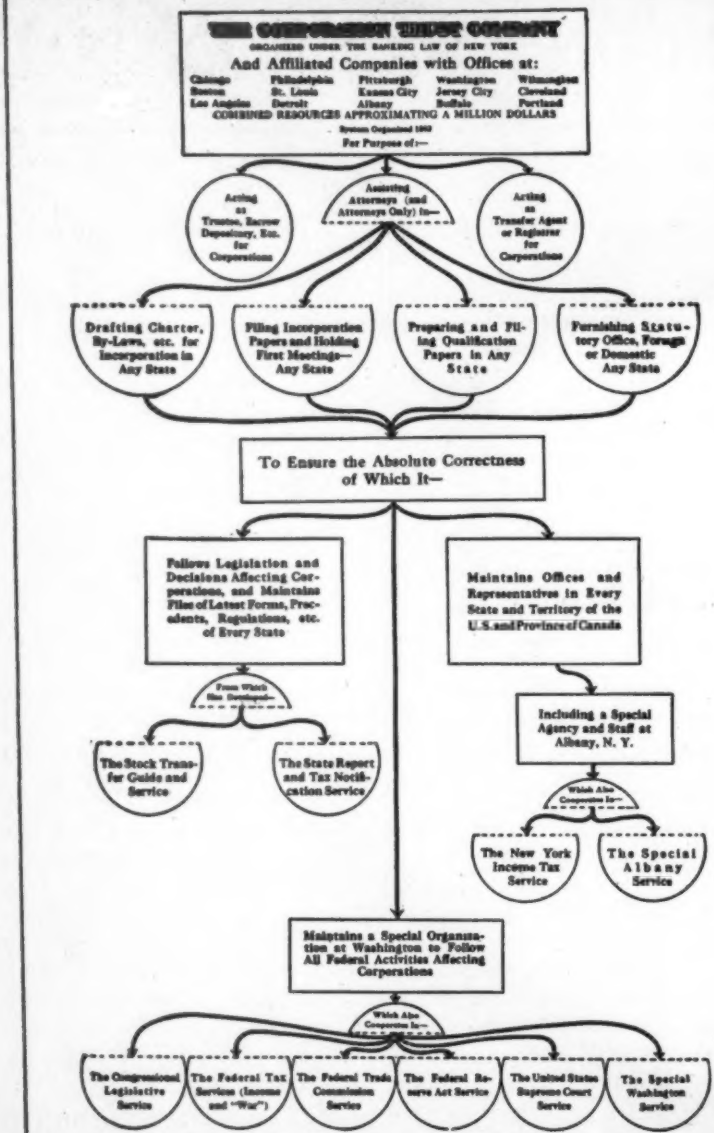
The policy of The Corporation Trust Company in all matters relating to the incorporation, qualification, statutory representation, and maintenance of corporations, is to deal exclusively with members of the bar.

IMPORTANCE OF QUALIFYING FOREIGN CORPORATIONS

Another case of personal liability growing out of failure to comply with foreign corporation laws is reported in this number of The Corporation Journal. The new decision comes from the Illinois Appellate Court, First District (Chicago) and will, undoubtedly, command attention from corporation counsel throughout the United States. Complete copies of this decision in pamphlet form may be had on request at any of our offices. A limited supply of the Tennessee opinion on stockholders' liability (Equitable Trust Co. et al v. Central Trust Co. et al.) decided in 1922, is still available.

Kenneth Kenyon

President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Which Also Cooperates In—
The Congressional Legislative Service
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The Federal Trade Commission Service
The Federal Reserve Act Service
The United States Supreme Court Service
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THE CORPORATION JOURNAL

Edited by John H. Sears of the New York Bar

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Talks on Foreign Corporations.

No. 15. Another case of personal liability for failure of corporation to qualify under foreign corporation laws.

The Tireoid Company is a Maine Corporation. It occupied premises on Michigan Avenue, Chicago and there manufactured a composition used to prevent punctures in automobile tires. The entire business was conducted from the Chicago office. In the regular course of this business a contract for advertising service was entered into with Critchfield and Company. Payments were made by the Tireoid Company from time to time on the account, but a balance was left of $15,-710.50 which Critchfield & Company were unable to collect from the corporation. The Tireoid Company ceased doing business, sold all its assets and realized therefrom an insufficient sum to pay its debts. Critchfield and Company's attorneys thereupon wrote each director of the Tireoid Company calling their attention to the fact that their corporation had never been legally authorized to do business in Illinois and asserting individual liability against the directors, on that account, for the money due their clients.

In due course suit was brought in the Municipal Court of Chicago and a judgment secured for the full amount of the claim against A. Watson Armour, James Levy, Lafayette Markle, H. H. Merrick, H. E. Otte, W. T. Perkins and C. W. Price, as officers, directors and agents of the Tireoid Company. Appeal was taken to the Illinois Appellate Court, First District. James Rosenthal appeared for the appellee-plaintiffs, i. e., Critchfield & Co. and Eugene H. Garnett and Charles H. Pegler for the appellants-defendants, i. e. officers, etc., of the Tireoid Company.

The Appellate Court, in its opinion recently handed down, affirms the judgment of the Municipal Court, completely sustaining the theory of personal liability.

With respect to the point of individual liability, the Appellate Court quotes from the case of

Ryerson vs. Shaw, 277 Illinois 524. In answer to an argument that at the time the advertising contract was made the Tireoid Company was not doing business in Illinois, the Court holds that the acts of the corporation up to that time, coupled with the manifest intention to proceed, as soon as possible, with the manufacture and sale of the company's product in and from Chicago "constituted doing business in the state of Illinois within the meaning and intent of the statute." Argument was made that the plaintiffs were estopped from making the claim of individual liability because they had accepted payments on account from the corporation and knew they were doing business with the corporation. The court, however, thought that the acceptance of payment from the corporation of money on account did not operate as an estoppel.

In the Tennessee case, Equitable Trust Company vs. Central Trust Company, (Tenn. 1922), 239 S. W. 171, judgment was secured against a single stockholder in the sum of $146,637.39. In this case the court referred to an earlier decision, Cunningham vs. Shelby, 136 Tenn. 176, 188 S. W. 1147, L. R. A. 1917 B, 572 as holding that stockholders of a foreign corporation attempting to do business as such in Tennessee, without having attempted to comply with the statutory requirements relating to foreign corporations are liable on their contracts as partners although such contracts are made in the name of the corporation and notwithstanding stockholders did not know of such non-compliance.

The Tennessee case referred to decisions from Florida, Illinois, New Jersey and Pennsylvania as having "the same effect." These cases and statutory provision in North Dakota providing for individual liability were discussed in The Corporation Journal for April-June 1922.

The statutes of Colorado (Sections 919, Revised Statutes 1908) provide that failure to comply with the provisions for qualifying a corporation in the state "shall render each and every officer, agent and stockholder in such corporation so failing herein, jointly and severally, personally liable on any and all contracts of such company made within the state during the time that such corporation is so in default."

The recent Illinois decision will no doubt stimulate further inquiry with respect to the common law and special statutory provisions, and will result in increased litigation involving personal liability of stockholders, directors and officers of foreign corporations.

Domestic Corporations

Canada

Effect of Restoring a Company to the Register is "that thereupon the company being an incorporated company, shall be deemed to have continued in existence as if its name had not been struck off." (Sec. 21 of the Companies Act 1913 as amended). This means that such companies shall be restored to their original position but not, however, in violation of the intervening rights of other persons. Thoroughbred Ass'n v. Brighouse , 70 D. L. R. 130.

Delaware

Verification of Claim Against Receiver. A claim against a receiver based on a judgment which is verified by the treasurer of the claimant corporation is not the verification required by Chancery Rule 156 where the judgment was in favor of an individual and an assignment to the corporation was not shown. Hawkins v. Lewes Journal Co., 119 Atl. 243.

Indiana

Non Par Value Shares are Authorized. An Act, approved by the Governor on February 27, 1923, provides that any corporation hereafter organized in the State of Indiana, except banks, trust companies, insurance companies, surety and casualty companies, may provide in its articles of incorporation for the issuance of common stock of no par value.

Any corporation heretofore or hereafter organized, with the exception of the companies named above, may amend its articles of incorporation to provide for the issuance of shares without par value or may change all or any portion of its outstanding common stock into shares without par value.

For the purpose of estimating the fees to be paid and, for the purpose of determining the proportion of preferred stock that may be issued, shares without par value shall be deemed to have par value of $10 each.

Kentucky

Issue of Stock Without Consideration. Stock was issued at par, pledged for a debt of this corporation, and later bought from the pledgee by the principal stockholders who made a gift of it to the appellant, an employee, the corporation issuing new shares in lieu thereof. An attempt to show that the real purchaser of the stock from the pledgee was the corporation having failed; held, that this was not an issue of stock without consideration in contravention of constitutional or statutory provisions. Johnson v. Belle Point Lumber Co., 244 S. W. 906.

Individual Assets of Testator May not be Employed in Carrying on Corporate Business. The testator by his will gave his

widow a life estate in his property both real and personal and also a life interest in a business which he had conducted under the corporate form. Held that the widow as trustee to continue the business had no power to use the personal estate or to mortgage the real estate in order to provide funds for carrying on the business of the corporation. Covington v. Covington, 245 S. W. 275.

Maryland

Power of President to Incumber Corporate Property. Whenever a president of a corporation seeks by his own acts, and without lawful authority from the corporation, to incumber and give a lien upon the company's property his acts are illegal and void. So where a chattel mortgage was executed by the president of a corporation without authority from the directors and under circumstances which should have put the mortgagee on inquiry as to the president's authority, it may be repudiated by a trustee in bankruptcy without tendering any sums advanced under the mortgage. The presence of the corporate seal on the mortgage raises a presumption of its validity but this presumption can be rebutted by evidence of the actual circumstances of the execution of the instrument. Maryland Finance Co. v. Duvall, 284 Fed. 764.

Massachusetts

Ultra Vires Guarantee of Lease. A corporation organized to manufacture, buy and sell merchandise, and carry on the business of a department store, does not have the power to guarantee a lease to another corporation carrying on a similar business on neighboring premises, where it fails to show that such power is fairly incidental or auxiliary to the main business of the corporation and necessary or expedient in the protection, care and management of its property. Wm. Filene's Sons Co. v. Gilchrist Co., 284 Fed. 664.

Mortgage of all Corporate Assets by Directors Invalid. Under Statutes 1903, Chap. 437, Section 40 a sale of all of the assets of a corporation can be made only upon the authorization or ratification of two-thirds of the stockholders. A mortgage of all the assets of a corporation is potentially a disposal of the entire business of the corporation, for in Massachusetts a mortgage is in terms and legal effect a sale subject to defeasance. Hence such a mortgage, by the directors alone and without approval of two-thirds of the stockholders, is invalid. Commerce Trust Co. v. Chandler, 284 Fed. 737.

Michigan

Use of Defunct Corporation's Name by New Corporation. Where the charter of a corporation had expired by limitation and it continued in existence only for the purpose of prosecuting and defending suits, a receiver having been appointed, its name could be used by a newly organized corporation. "The name did

not survive the business of which it was but a permitted designation." The receiver could not enjoin the use of the name on the ground that it was an existing good will and as such an asset in his hands capable of being sold, because to constitute a good will there must be a running plant and the probable retention of customers; here the corporation was dead. The bill showed no exclusive products to which the name had attached a trade meaning. The new corporation had a right to manufacture the same products at will. Finally, the use of the name did not constitute unfair competition for since the receiver could not carry on the business of the old corporation, the two corporations were not competing. Grand Rapids Trust Co. v. Haney School Furniture Co., 191 N. W. 196.

Missouri

Corporation Not Bound by Unauthorized Lease. Where a lease was executed on behalf of a corporation without authority by one who shortly thereafter became general-manager of the corporation, there was a presumption that the corporation had knowledge of the lease, but this presumption was rebutted by the testimony of all the officers and directors that they knew nothing of the lease. The corporation was therefore not estopped to deny the lease nor could it be deemed to have ratified it, for to constitute either an estoppel or ratification there must have been a knowledge of the facts. Wabash Ry. Co. v. Jones, 284 Fed. 705.

Nebraska

Promise of Employment as Fraudulent Inducement to Stock Subscription. The defendant promised to make the plaintiff vice-president of the company at a salary which was to be sufficient to cover the interest on the notes to be given as part of the purchase price of the stock. The plaintiff made the purchase but now seeks to rescind on the ground of fraud, the above promise not having been fulfilled. Held that though the promise to give employment could not be enforced as being against public policy it could be shown as a fraudulent inducement. Scow v. Bankers, Fire Ins. Co., 190 N. W. 858.

New York

Necessity of Stockholders' Consent to Mortgage. The Circuit Court of Appeals holds that a chattel mortgage given by a corporaton without the written consent of two-thirds of the stockholders is void under Section 6 of the New York Stock Corporation Law; and a trustee in bankruptcy may bring an appropriate proceeding to have such chattel mortgage declared void. In re Astell Engineering & Iron Works, Inc., 284 Fed. 967 aff'g 278 Fed. 743; see The Corporation Journal No. 111, page 73.

Similarity in Corporate Names. The first corporation in this case is the "N. J. Henry Manufacturing Company, Inc." It manu-

How Liabilities May Be Incurr

The United States Supreme Court, in Western Union Telegraph Co. v. Davenport (97 U.S. 369) held. . . "The officers of the company are the custodians of its stock books and it is their duty to see that all transfers are properly made, either by the stockholders themselves or persons having authority from them. . . . Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock nor the good faith of the purchaser of stolen property will avail as an answer to the demand of the true owner."

"Unauthorized"

Different state's laws confer different degrees of authority on Executors, Administrators, Guardians, Trustees, and other fiduciaries or agents, or impose different restrictions upon them.

Any certificate of stock, in any corporation, of any state, may at any time, through the present owner's death, incompetence, bankruptcy or other cause, pass into the control of one whose authority is thus definitely limited by the law of the state under which he acts. That state may be far distant from the one in which the corporation is domiciled.

When such a certificate is presented for transfer the officers of the corporation, to protect the company against liability for

factures window, door and porch screens. The defendant's name is the "Henry Screen Manufacturing Company, Inc." It is engaged in exactly the same business. The New York Appellate Division, in granting an injunction restraining the defendant from using its present name, said: "It seems reasonably clear that many people would think of the first corporation as the Henry Screen Company. It would be the natural and ordinary way to speak of it. Can it be doubted that as a practical matter this similarity of names is likely to deceive? It seems that it was intended to deceive. The defendant not only adopted a name so closely resembling plaintiff's, but it also adopted letterheads and envelopes that, except for slight difference in names, street addresses and telephone calls, are duplicates of the plaintiff's. . . . The confusion is rendered 'worse confounded' by the fact that N. J. Henry, who was one of the incorporators of the plaintiff and whose name forms part of the corporate name, is now the president of the defendant, and his name as such appears on its letterheads. Therefore, anyone receiving a communication from defendant has every distinguishing feature of plaintiff's name presented to him on defendant's letterhead. It would take a very retentive and analytical memory to carry in mind the fact that the 'Henry Screen Manufacturing Company, Inc.,' of which N. J. Henry is president, is not the same as the N. J. Henry Manufacturing Company, Inc., which manufactures screens." N. J. Henry Mfg. Co. v. Henry Screen Mfg. Co., 197 N. Y. Supp. 444.

Personal Liability of Liquidating Trustees. The defendant as liquidating trustee of a corporation entered into a contract for the purchase of goods. Held, that the trustees were personally liable on the contract, citing Sears, "Trust Estate as Business Companies," Chap. 5. "A trustee is not an agent. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee." The fact that the goods were sold and delivered on the faith and credit of the trust estate and billed in the name of the corporation did not absolve the trustees from liability; they could accomplish that result only by an express agreement with the vendors. Laun-Dry-Ette Sales Co., Inc. v. Fielding, 119 Misc. 778.

A Corporation May Lease Its Plant to Another Corporation. A corporation with power in its charter to lease may make a lease of its entire plant to another corporation which carries on the same character of business, and it is not necessary to procure the consent of two-thirds of the stockholders under Section 16 of the New York Stock Corporation Law. Objecting stockholders in a case like this have no right to obtain an appraisal of their stock under Section 17, for under the lease the corporation did not part with its good will or franchise, nor did it deprive itself of the power to carry on the same business at the expiration of the lease. In

exercising a power granted by the charter, the directors and assenting stockholders, acted in the best interest of the corporation and assured the accomplishment of the object for which the stockholders had organized the corporation. Matter of Knaisch, 203 N. Y. App. Div. 725.

Oregon

Payment of Stock in Property. Where all of the stockholders and directors act in good faith in fixing the value of property which the corporation is to accept in payment for some of its stock, their judgment as to the value of the property is conclusive as to every one who participated in and had knowledge of the transaction and who did not dissent from the action taken. Huson v. Portland & S. E. Ry. Co. 211 Pac. 897.

Effect of Contracts Made Before Organization. Corporations cannot be bound by acts done or promises made in their behalf before they came into existence. Until organized a corporation has no being, franchises or faculties. Its promotors are in no sense identical wth the corporation, nor do they represent it in any relation of agency, hence they have no authority to enter into preliminary contracts binding on the corporation unless so authorized by the charter. Huson v. Portland & S. E. Ry. Co., 211 Pac. 897.

Non-Par Value Shares are Authorized. An Act recently approved in Oregon, which becomes effective ninety days after the adjournment of the Legislature, authorizes every corporation, except trust companies, building and loan associations and corporations organized for the purpose of carrying on the business of banking, insurance or surety-ship, to provide in the articles of incorporation, or any supplementary articles of incorporation, for the issue of shares without nominal or par value with such designations, preferences, if any, and voting powers, restrictions or qualifications thereof as may be set forth.

For the purpose of determining the amount of the organization or annual license fee, shares without par value will be deemed to have a par value of $100 each.

Washington

Validity of Stockholders' Meeting. Failure to present the books of a corporation and its financial statement at a stockholders' meeting, as required under the by-laws, does not render the meeting void if there was in fact a sufficient number of stockholders present to enable the holding of a legal meeting. State ex rel. Jamieson v. LaVergne, 211 Pac. 734.

Foreign Corporations

Montana

Non Par Value Corporations no Longer Admitted. In Chapter 132, Laws of 1923, relating to the fees payable by foreign corporations,

provision is made that after the passage of said Act no foreign corporation shall be permitted to enter the state of Montana for the transaction of business if such foreign corporation has stock of no par value. Act became effective March 8, 1923.

New York

"Doing Business." Where the vice-president of an Illinois corporation received an order for merchandise in New York but approved the same by letter from Chicago, this was not "doing business" in New York. Hence the foreign corporation though unlicensed could recover on the contract. This was at most an isolated transaction which in New York is not sufficient to constitute "doing business." Gumbinsky Bros. Co. v. Smalley, 197 N. Y. Supp. 530.

Utah

Accepting Assignment of Obligation Not "Doing Business." The purchase in California, by a corporation of that state, of a contract obligation of a citizen of Utah does not constitute a doing of business by the foreign corporation in Utah, therefore the corporation can sue on the contract without qualifying. Anglo-California Trust Co. v. Hall, 211 Pac. 991.

Taxation

Connecticut

Affiliated Corporations Doing Business Outside of State Taxed on Amount of Income Realized in State. The consolidated Federal return of the plaintiff and its affiliated companies, some of which were doing business in Connecticut and others doing business outside the state, disclosed a loss and hence no tax was due the United States. Held, that this did not preclude the State of Connecticut from levying a tax where the return of only those affiliated companies doing business in Connecticut showed a net income. The basis for the tax is not the amount of the Federal tax as shown by the consolidated return of all the companies, but the net income realized from the doing of business in Connecticut, which is that proportion of the entire net income of the companies doing business in Connecticut which the fair cash value of the real estate and tangible personal property in Connecticut bears to the fair cash value of the entire real estate and tangible personal property owned by the corporations. Singer Mfg. Co. v. Gilpatric, 118 Atl. 919.

Montana

Important Amendments. Chapter 146, Laws of 1923, amends certain sections relating to the imposition and the method of collecting the corporation license tax which is measured by income. Among

other things this Act provides that if the State Board of Equalization has reason to believe that the business of any corporation is so conducted as either directly or indirectly to distort the true net income of the corporation and the net income properly attributable to the State of Montana whether by arbitrary shift of the income through price fixing, charges for service or otherwise, whereby the net income is arbitrarily assigned to one or another corporation carrying on business under a substantially common control, it may require the disclosure of such facts as it deems necessary for the proper computation of the income and the net income properly attributable to the State of Montana and in determining the same the Board shall have regard to the fair profits which would normally arise from the conduct of the business.

Tennessee

New Tax on Corporations. Chapter 21, Laws of 1923, which was approved by the Governor on February 16th, imposes an annual excise tax of 3% of the net earnings of domestic and foreign corporations arising from business done wholly within the State of Tennessee, excluding the earnings arising from inter-state commerce. Any corporation paying a tax under this Act is entitled to a credit upon the tax for the amount paid as an annual franchise tax to the Secretary of State in the preceding twelve months prior to July 1st; and corporations engaged in mercantile pursuits and paying the merchant's privilege tax in the State of Tennessee shall be entitled to a credit for the amount so paid during the preceding twelve months; and all other corporations shall be entitled to a credit for any amount paid to the State for such preceding twelve months under the General Revenue Bill as a privilege tax unless otherwise expressly provided in the Act imposing the privilege tax.

The tax under this Act shall be due and payable on July 1, 1923 and on July 1 of each succeeding year and if delinquent for thirty days shall be subject to a penalty of 1% per month and in addition interest at the rate of 6% per annum from July 1.

The supervision and collection of this tax shall be under the direction of the Department of Finance and Taxation which will prescribe suitable forms.

Utah

Foreign Corporation must now Pay Tax on Entire Authorized Capital. The Law of Utah with respect to the admission of foreign corporations provides for the payment of a fee based upon the total authorized capital stock.

The same is true in the case of the annual franchise tax.

For the last few years, however, the Secretary of State, acting upon the advice of the then Attorney General, has required foreign corporations to pay the fees only upon the amount of capital located in the state. The present Attorney General advised the Secretary of State to require payment on the entire authorized capital stock.

Some Important Matters for April and May

This calendar does not purport to cover general taxes or reports to other than state officials, nor those we have been officially advised are not required to be filed. *The State Report and Tax Service* maintained by *The Corporation Trust Company System* sends timely notice to attorneys for subscribing corporations of report and tax matters requiring attention from time to time, furnishing information regarding forms, practices and rulings.

ARKANSAS—Franchise Tax Report due on or before June 1st. Domestic and Foreign Corporations.

COLORADO—Annual License Tax due on or before May 1st. Domestic and Foreign Corporations.

DELAWARE—Annual Franchise Tax due between 3rd Tuesday in March and July 1. Domestic Corporations.

DOMINION OF CANADA—Annual Summary due between April 1st and June 1st. Domestic companies having capital stock.

Annual Income Tax Return due between January 1st and April 30th. Domestic and Foreign Corporations.

MAINE—Annual Tax Return due on or before June 1st. Domestic Corporations.

MASSACHUSETTS—Franchise Tax Return due between April 1st and April 10th. Domestic Corporation and certain Foreign Corporations.

MONTANA—Annual Report due in April or May. Foreign Corporations.

Annual License Tax based on Net Income due between June 1st and June 15th. Domestic and Foreign Corporations.

NEBRASKA—Statement to Tax Commissioner re stockholders residing in Nebraska due on or before April 15th. Foreign Corporations.

NEW JERSEY—Annual Tax Return due on or before first Tuesday of May. Domestic Corporations.

NEW YORK—Annual Return of withholding agents due between January 1st and April 15th. Domestic and Foreign Corporations.

OHIO—Annual Report during May. Domestic Corporations.

QUEBEC—Sworn statement for Treasury Department due on or before May 1st. Domestic and Foreign Corporations.

TEXAS—Annual License Tax due on or before May 1st. Domestic and Foreign Corporations.

VERMONT—List of Stockholders due on or before April 5th. Domestic and Foreign Corporations.

WEST VIRGINIA—Annual Report due in April. Foreign Corporations.

Making the Preferred Stock Clause Unassailable

How to Make Use of This Company's Assistance

If you have all papers ready for the incorporation or qualification of a company, call a representative of The Corporation Trust Company from the nearest office. He will see that all necessary papers are filed and recorded at the proper times and places, all required notices published, the incorporators' meeting held, furnishing incorporators if desired, that the minute book is properly opened, and that a statutory office is established and maintained where required. If the incorporation is to be in Delaware you may, if you prefer, send the papers and instructions direct to our Wilmington office.

If, however, you desire precedents or further information about any point—for instance as to comparative costs of incorporation and maintenance in various available states; or as to comparative advantages in charter provisions; or as to the most unassailable phrasing of the Purpose Clause, or the Preferred Stock Clause, or for clauses defining or limiting directors' or stockholders' powers, or other special points; or if you wish to be more certain as to the most economical organization or reorganization plan in point of stamp and income taxes, or as to whether or not the nature of your client's business will require the company to be qualified as a foreign corporation in various states—then you have but to outline the nature of the problem to our representative. He will obtain from our files and bring to you complete, up-to-the-minute information on which to decide correctly every point.

If you are not certain as to the proposed corporate name being available in the state of incorporation and in all the states in which the new company will have to be qualified, our representative will submit the matter to our office in each of those states and bring you the information in a fraction of the time it would take if you tried to handle the matter by correspondence direct with the state departments.

Costly lawsuits between corporations and the holders of their Preferred Stock have many times developed simply because, at the time of incorporation or reorganization, seemingly remote contingencies were not taken account of by the incorporators and counsel put on notice to provide for them in the Preferred Stock Clause of the Charter.

It is in such matters that The Corporation Trust Company helps attorneys to make themselves more valuable to their clients.

This company, with its long and varied experience in assisting corporation attorneys, and its close observation of the cases and decisions in all Federal and state courts relating to corporations, is able to help counsel bring to his client's attention every contingency which experience has shown may arise for each particular type of company. It also supplies the attorney with precedents from thoroughly tested charters for safely and explicitly covering each point.

The Preferred Stock Clause is only one of many features of the Charter in which The Corporation Trust Company increases the value of counsel's services to his clients.

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